GAN SENG BIANG A

v.

FOREMOST HOLDINGS BHD

COURT OF APPEAL, PUTRAJAYA B
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02-281-2011]
13 JUNE 2012 C

CIVIL PROCEDURE: *Amendment - Pleadings - Application to re-amend amended statement of claim - Application filed after judgment sealed and perfected - Whether accidental slip or omission which fell within ambit of O. 20 r. 11 Rules of the High Court 1980 - Whether court functus officio* D

CIVIL PROCEDURE: *Judgments and orders - Application to amend - Amendment of sealed and perfected judgment - Accidental slip or omission - Whether accidental slip or omission a clerical mistake - Whether fell within ambit of O. 20 r. 11 Rules of the High Court 1980* E

CIVIL PROCEDURE: *Pleadings - Amendment - Application to re-amend amended statement of claim - Slip or omission in statement of claim - Whether Bahasa Malaysia version of pleading prevailed over English language version - Whether English language version mere translation - Rules of the High Court 1980, O. 92 r. 1* F

The appellant had obtained a judgment against the respondent in the High Court. The respondent subsequently wrote to the Deputy Registrar seeking for the settlement of certain issues in the G draft order, *inter alia*, the exact date from which and until which the arrears of rental ought to be calculated and when was the exact date from which the interest was to be calculated. The respondent also pointed out that the draft order did not specify the rate of interest. After appearing three times before the Deputy H Registrar, the Deputy Registrar settled the terms of the judgment and the judgment was then sealed and perfected. The appellant subsequently filed a summons in chambers in encl. 105 for: (i) re-amendment of the amended statement of claim in prayer (C) to substitute the words "dari 6 November 2002" to the words I "sebagaimana pada 6 November 2002 (iaitu tempoh dari

A 2 Februari 2002 sehingga 1 Oktober 2002)"; and (ii) to amend the sealed and perfected judgment to substitute the words "dari 6 November 2002" the words "dari 2 Februari 2002". The learned High Court judge held that the amendment to the judgment did not fall within the ambit of O. 20 r. 11 ('the slip B rule') of the Rules of the High Court 1980 ('RHC'). The judge further held that the amendment sought would substantially affect the amount that the respondent would have to pay the appellant under the judgment and it would be a variation of the judgment and therefore, dismissed the application. Hence this appeal.

C

Held (dismissing the appeal)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

D **(1)** As the application in encl. 105 came after the judgment had been perfected, the court was no longer in the position to grant leave for the re-amendment of the amended statement of claim *(Abdul Johari Abdul Rahman v. Lim How Chong & Ors* (dist)*; GL Baker Ltd v. Medway Building & Supplies Ltd* (dist)). (paras 9-16)

E

(2) The clear words in O. 20 r. 11 of the RHC indicate that the accidental slip or omission referred to in the rule is accidental slip or omission in the judgment itself. However, in the instant case, the purported accidental slip or omission was in the F prayer in the amended statement of claim. The proposed amendment to the judgment was clearly not a clerical mistake. The terms were settled by the learned Deputy Registrar after meeting the parties several times. The commencement date for the calculation of the arrears was clearly based on the terms G of prayer in the amended statement of claim. (paras 20-24)

(3) Pursuant to O. 92 r. 1 of the RHC, the only version of the pleadings to be taken into account is the national language version whereas the English language version is a mere H translation. In light of this, the Malay language version of the amended statement of claim containing the word "dari" prevailed over the English language version which allegedly had the correct prayer of "as at 6 November 2002". Further, in view of the fact that the word "dari" had been in prayer (C) I of the statement of claim from the time the suit was commenced until the date of judgment, and had even survived

the amendment to the statement of claim, the Deputy Registrar could not have settled the judgment in any other manner. (paras 25-30)

(4) The learned High Court judge did not err in the decision that the amendment sought by the appellant in encl. 105 could not come within the slip rule in O. 20 r. 11 of the RHC and that the court was *functus officio*. (para 31)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memperoleh penghakiman terhadap responden di Mahkamah Tinggi. Responden kemudiannya menulis surat kepada Timbalan Pendaftar memohon penyelesaian isu-isu tertentu di dalam deraf perintah, antara lain, tarikh sebenar dari bila dan sehingga bila tunggakan sewa perlu dikira dan apakah tarikh sebenar permulaan pengiraan faedah. Responden juga menyatakan bahawa deraf perintah tersebut tidak menyatakan secara khusus kadar faedah. Selepas hadir sebanyak tiga kali di hadapan Timbalan Pendaftar, Timbalan Pendaftar menyelesaikan terma-terma penghakiman dan penghakiman tersebut kemudian dimeterai dan disempurnakan. Perayu kemudian memfailkan saman dalam kamar dalam lampiran 105 untuk: (i) pindaan semula bagi penyata tuntutan terpinda dalam tuntuan (C) untuk menggantikan perkataan "dari 6 November 2002" kepada perkataan "sebagaimana pada 6 November 2002 (iaitu tempoh dari 2 Februari 2002 sehingga 1 Oktober 2002)"; dan (ii) untuk meminda penghakiman yang telah dimeterai dan disempurnakan dengan menggantikan perkataan "dari 6 November 2002" dengan perkataan "dari 2 Februari 2002". Yang Arif hakim Mahkamah Tinggi memutuskan bahawa pindaan kepada penghakiman tidak terangkum dalam A. 20 k. 11 ('slip rule') Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim selanjutnya memutuskan bahawa pindaan yang dipohon akan memberi kesan secara substansial kepada jumlah yang responden perlu bayar kepada perayu di bawah penghakiman dan ia akan mengubah penghakiman dan dengan itu, menolak permohonan tersebut. Maka rayuan ini.

Diputuskan (menolak rayuan)
Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Memandangkan permohonan di dalam lampiran 105 timbul selepas penyempurnaan penghakiman, mahkamah tidak lagi berada dalam kedudukan untuk memberi kebenaran untuk

pindaan semula penyata tuntutan terpinda *(Abdul Johari Abdul Rahman v. Lim How Chong & Ors* (dibezakan); *GL Baker Ltd v. Medway Building & Supplies Ltd* (dibezakan)).

(2) Perkataan jelas A. 20 k. 11 KMT menunjukkan bahawa kesilapan atau peninggalan secara tidak sengaja yang dirujuk di dalam kaedah adalah kesilapan atau peninggalan yang tidak disengajakan di dalam penghakiman itu sendiri. Walau bagaimanapun, di dalam kes ini, kesilapan atau peninggalan yang dimaksudkan adalah di dalam permohonan di dalam penyata tuntutan terpinda. Pindaan yang dicadangkan kepada penghakiman tersebut jelas bukan kesilapan perkeranian. Terma-terma tersebut telah ditetapkan oleh Timbalan Pendaftar selepas bertemu dengan pihak-pihak beberapa kali. Tarikh permulaan pengiraan tunggakan adalah jelas berdasarkan kepada terma yang dipohon di dalam penyata tuntutan terpinda.

(3) Berikutan A. 92 k. 1 KMT, satu-satunya versi pliding yang perlu diambil kira adalah dalam bahasa kebangsaan manakala versi bahasa Inggeris adalah penterjemahan semata-mata. Dengan itu, penyata tuntutan terpinda versi Bahasa Malaysia yang mengandungi perkataan "dari" mengatasi versi Bahasa Inggeris yang didakwa mengandungi permohonan yang betul "as at 6 November 2002". Selanjutnya, berikutan fakta bahawa perkataan "dari" telah terkandung di dalam permohonan (C) penyata tuntutan dari masa guaman tersebut dimulakan sehingga tarikh penghakiman, dan malahan telah melalui pindaan semasa penyata tuntutan dipinda, Timbalan Pendaftar tidak mungkin boleh mencapai penghakiman yang berbeza.

(4) Yang Arif hakim Mahkamah Tinggi tidak terkhilaf di dalam keputusannya bahawa pindaan yang dipohon oleh perayu di dalam lampiran 105 tidak boleh terangkum di dalam 'slip rule' di bawah A. 20 k. 11 KMT dan bahawa mahkamah telah *functus officio*.

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(dist)***

Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd [2004] 4 CLJ 825 HC ***(dist)***

GL Baker Ltd v. Medway Building & Supplies Ltd [1958] 1 WLR 1216; [1958] 3 All ER 540 CA ***(dist)***

Hock Hua Bank v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11, O. 92 r. 1

For the appellant - Joanne Lazaroo; M/s Amin, Yap & Co
For the respondent - SN Sakthy Vell; M/s Arnold Andrew & Co

[Editor's note: For the High Court judgment, please see Gan Seng Biang v. Foremost Holdings Berhad & Ors [2011] 1 LNS 855.]

Reported by S Barathi

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This is an appeal from the decision of the learned High Court Judge, Tengku Maimun Tuan Mat J, who dismissed the appellant's appeal to the judge in chambers (encl. 108) against the dismissal by the Deputy Registrar of his application made by way of summons in chambers dated 26 May 2010 (encl. 105) to re-amend his amended statement of claim and to amend the judgment of the court dated 25 November 2009.

Background

[2] The appellant commenced proceedings by way of writ of summons against five defendants, with the respondent being the 1st defendant. The respondent had given a guarantee dated 13 July 2000 to the appellant to pay to the appellant any outstanding amount due and owing by the 2nd defendant in respect of the premises rented by the 2nd defendant from the appellant.

[3] The suit was heard in a full trial by Dr Haji Hamid Sultan JC (as His Lordship then was). Decision was given on 25 November 2009 against the respondent. In his written judgment given on that date, the learned Judicial Commissioner made the following order:

(i) the 1st defendant to pay all rental arrears, until the 25.7.2003 with interest at 8% per annum from the date of filing of the writ until the date of judgment and with 8% per annum from the date of judgment until the date of realisation with costs in the sum of RM50,000;

(ii) the said judgment be settled before the deputy registrar;

[4] A draft of the judgment was prepared by the appellant's solicitors, signed by them and transmitted to the solicitors for the respondent. That draft order stated that the appellant's claim against the respondent was allowed as follows:

(a) tunggakan sewa dari Februari 2002 sehingga 25 Julai 2003 (18 bulan) berjumlah RM720,000

(b) faedah ke atas RM720,000 dari 26 Julai 2003 sehingga tarikh penyelesaian sepenuhnya dan

(c) kos tindakan sebanyak RM50,000

[5] The respondent's solicitors then wrote to the Deputy Registrar by letter dated 11 December 2009, invoking, *inter alia*, para. (ii) of the learned Judicial Commissioner's decision, and sought certain issues to be settled. The main issues were:

(a) when was the exact date from which, and until which, the arrears of rental ought to be calculated;

(b) when was the exact date from which interest was to be calculated: was it from 26 July 2003 as set out in the draft judgment or from the date of the writ of summons.

The respondent's solicitors also pointed out that the draft order did not specify the rate of interest.

[6] According to the learned High Court Judge (Tengku Maimun J) in her decision, court records showed that the parties appeared three times before the learned Deputy Registrar, the last appearance being on 24 February 2010. On that date the learned Deputy Registrar settled the terms of the judgment of 25 November 2009.

[7] The judgment as settled by the learned Deputy Registrar was then sealed and perfected and filed in court as encl. 103.

[8] Subsequent to that, the appellant filed the summons in chambers in encl. 105 to re-amend the amended statement of claim and to amend the sealed and perfected judgment.

[9] The learned High Court Judge, Tengku Maimun J, held that the amendment to the judgment did not fall within the ambit of O. 20 r. 11 ("the slip rule") of the Rules of High Court 1980. She took the view that the amendment sought would substantially affect the amount that the respondent would have to pay to the

appellant under the judgment dated 25 November 2009 and such an amendment would in effect be a variation of such judgment. Relying upon the decision of the Federal Court in *Hock Hua Bank v. Sahari Murid* [1980] 1 LNS 92, she held that she was in no position to make such a variation.

Decision

[10] There were in fact two amendments sought by the appellant:

(a) a re-amendment of the amended statement of claim in prayer (C) to substitute for the words "dari 6 November 2002" the words "sebagaimana pada 6 November 2002 (iaitu tempoh dari 2 Februari 2002 sehingga 1 Oktober 2002)";

(b) an amendment of para. 1 of the judgment to substitute for the words "dari 6 November 2002" the words "dari 2 Februari 2002".

Application To Re-amend The Amended Statement Of Claim

[11] Counsel for the appellant referred us to several cases in support of the appellant's contention that the re-amendment to the amended statement of claim should have been allowed.

[12] We were referred to, in particular, the case of *Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825. In that case, the defendant applied for leave to amend its statement of defence after summary judgment had been entered against the defendant by the Senior Assistant Registrar, but before the defendant's appeal to the judge in chambers against that summary judgment was heard.

[13] Our attention was drawn, in the appellant's written submissions, to that part of the *Bumiputra-Commerce* case where Abdul Malik Ishak J (as His Lordship then was) said, *inter alia*, that "reported cases abound in the law journals which categorically show that amendments to pleadings are allowed before trial, during trial, before judgment, after judgment and even when there is a pending appeal against a judgment in a situation where the said judgment has been granted premised on the original un-amended pleadings".

[14] Our attention was also drawn to the case of *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361 which was cited in the *Bumiputra-Commerce* case as a case in which the Court of Appeal was said to have accepted a passage from "The Supreme Court Practice (1995) volume 1, part 1" on the stage at which amendments to pleadings may be allowed.

[15] *Abdul Johari*'s case involved an appeal on the decision of the High Court allowing the defendants to amend their counterclaim before the trial of the case. The actual passages in *Abdul Johari*'s case alluded to in the *Bumiputra-Commerce* case are as follows:

> Page 374 of the Supreme Court Practice 1995, Vol. 1, Part I is of some assistance and is reproduced for effect:
>
> 20/5-8/9 At what stage of the proceedings amendments are allowed - Rules 5 and 8, expressly state that an amendment may be allowed, "at any stage of the proceedings" (*Roe v. Davies* [1876] 2 Ch D 729, 733) and amendments may be allowed before, or at, or after the trial, or even after judgment or on appeal (*The Duke of Buccleuch* [1892] P. 201; *GL Baker Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 WLR 1216; [1958] 3 All ER 540, CA). As a general rule, however late the amendment is sought to be made, it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise (see eg, *Clarapede & Co. v. Commercial Union Association* [1883] 32 WR 262, where an amendment of unseaworthiness was allowed eight months after the original defence was delivered and after the return of a commission to take evidence abroad). But different considerations apply to different stages (*The Duke of Buccleuch* [1892] P. 201; *Ecklin v. Little* [1890] 6 TLR 366; *The Alert* [1895] 72 LT 124).

[16] The reference to the cases of *The Duke of Buccleuch* and *GL Baker Ltd v. Medway Building & Supplies Ltd* [1958] 1 WLR 1216; [1958] 3 All ER 540 appeared to suggest that in those cases the courts held that amendments to pleadings can be made even after a judgment has been perfected.

[17] However, upon reference to the actual report of the cases it became clear to us that those cases refer to the stage after judgment but before the judgment is perfected, in the sense that there is nothing left to be done after the judgment is sealed and perfected.

[18] In *The Duke of Buccleuch* (which involved a claim in respect of a collision of sea vessels) an amendment as to the name of a party was allowed after liability was determined but before damages were assessed. The essence of the judgment in that case can be found in the judgment of Lord Esher MR and Fry LJ, the relevant parts of which are reproduced below:

Lord Esher MR:

> The rule said, that if a wrong plaintiff was put on, they might put on the right one. It was within the very words of the two rules. But it is said that a judge cannot do that after the decree fixing the liability. That was an argument against the very words of the rule, which said "at any stage." **The decree fixing the liability in the Admiralty Court is not a final judgment. The proceedings are not over.** If there were no other judgment to be signed, the proceedings are not over, for the matter has to be sent to the registrar and merchants. I take it that there would be, if necessary, another decree after the registrar and merchants had found what the amount would be. (emphasis added)

Fry LJ

> The words of Order XVI., rr. 2 and 11, are quite ample to justify and require the amendment. I base my decision upon the words "at any stage of the proceedings." It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case. In this case there remains the assessment of damages.

[19] In *GL Baker Ltd v. Medway Building & Supplies Ltd* an application was made for leave to amend the statement of defence. Leave was refused and trial proceeded on the basis of the un-amended defence. Judgment was granted for the plaintiffs. The defendants appealed against the decision and, in the alternative, against the refusal of leave to amend, asking also for a new trial. The defendants were asked by the Court of Appeal to elect whether to appeal against the judgment or to ask for leave to amend. They elected to ask for leave to amend. The Court of Appeal granted leave to amend and ordered a new trial.

[20] It can be seen therefore that in those two cases cited in the Supreme Court Practice referred to by the Court of Appeal in *Abdul Johari*'s case the judgment was not a perfected judgment.

[21] That is not the case here. The application in encl. 105 to re-amend the amended statement of claim came after the judgment had been perfected, in accordance with the amended statement of claim as it stood on the date of the decision on 25 November 2009.

[22] We therefore agree with the learned High Court judge that the court was no longer in a position to grant leave for the re-amendment of the amended statement of claim.

Application To Amend The Judgment

[23] The application to amend the judgment was made in the same summons in chambers in encl. 105 as the application for leave to re-amend the amended statement of claim. Paragraph 3 of the grounds in the summons in chambers states that due to the error in prayer (C) in the amended statement of claim the judgment was also in error and that error should be corrected.

[24] The Federal Court in *Hock Hua Bank Bhd v. Sahari Murid* relied upon by the learned High Court Judge held that:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it has been drawn up except under the slip rule in O. 28 r. 11 Rules of the Supreme Court 1957 (O. 20 r. 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the Court: *Re St Nazaire* Co. 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment in default or made in the absence of a party at the trial or hearing.

[25] Order 20 r. 11 of the Rules of the High Court 1980 (the "slip rule") reads as follows:

> 11. Clerical mistakes in judgments or orders, or **errors arising therein** from any **accidental** slip or omission, may at any time be corrected by the court by summons without an appeal. (emphasis added)

[26] Was the proposed amendment to the judgment a clerical mistake?

[27] It was clearly not so. The terms were settled by the learned Deputy Registrar after meeting the parties several times. The commencement date for the calculation of the arrears was clearly based on the terms of prayer (C) of the amended statement of claim.

[28] Was the proposed amendment for the purpose of correcting 'errors arising therein from any accidental slip or omission'? A

[29] That too cannot be the case for the same reason as mentioned in para. 21 above.

[30] In any case, the clear words in r. 11 indicate that the accidental slip or omission referred to in the rule is accidental slip or omission in the judgment itself. In the case before us, the purported accidental slip or omission was in the prayer in the amended statement of claim. B C

[31] The appellant argued that the word "dari" in prayer (C) of the amended statement of claim was totally against the weight of the entire body of the pleadings.

[32] It was also argued that the English language version of prayer (C) had correctly prayed for rental and accrued interest "as at 6 November 2002". D

[33] In the appellant's written submission reference was made to a statement in the affidavit in opposition of the respondent to the effect that where there is inconsistency between the Malay language version and the English language version of the pleadings, the Malay language version must prevail. The appellant's contention was that such principle did not apply to pleadings. E

[34] We believe the relevance of the respondent's averment lies in the provisions of O. 92 r. 1 of the Rules of the High Court which provides that: F

> any document required for use in pursuance of these rules **shall** be in the national language and **may** be accompanied by the translation thereof in the English language ... (emphasis added) G

[35] Clearly the only version to be taken into account is the national language version. The English language version is a mere translation.

[36] In view of the fact that the word "dari" had been in prayer (C) of the statement of claim from the time the suit was commenced until the date of the judgment on 25 November 2009, and had even 'survived' the amendment to the statement of claim, we do not think the Deputy Registrar could have "settled" the judgment in any other manner. H I

[37] We are therefore unanimous in our view that the learned High Court Judge did not err in her decision that the amendment to the judgment as sought by the appellant through encl. 105 could not come within the slip rule in O. 20 r. 11, and that the court was *functus officio*.

[38] We therefore dismissed the appeal and upheld the decision of the learned High Court Judge.